IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE A.K.BASHEER
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 18TH JULY 2007 / 27TH ASHADHA 1929

WA.No. 33 of 2006

JUDGEMENT IN OP.5811/2003 Dated 29/09/2005
.....

APPELLANT/PETITIONER:

K.R. AMBIKADEVI, W/O. K.R. RAJAN,
AGED 40 YEARS, H.S.A. (MATHS),
S.R.V. N.S.S. HIGH SCHOOL, CHIRAKKADAVU.

BY ADV. SRI.KRB.KAIMAL (SR.)

RESPONDENTS/RESPONDENTS:

1. THE STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, GENERAL EDUCATION DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC INSTRUCTION JAGATHY, THIRUVANANTHAPURAM.

3. THE DISTRICT EDUCATIONAL OFFICER, KANJIRAPPALLY.

4. THE MANAGER, S.R.V. N.S.S. HIGH SCHOOL, CHIRAKKADAVU.

5. SMT.BINDU. V. NAIR, HIGH SCHOOL ASSISTANT (SOCIAL STUDIES), S.R.V. N.S.S. SCHOOL, CHIRAKKADAVU.

R1 TO R3 BY GOVT. PLEADER SRI.NOBLE MATHEW
R4 BY ADV. SRI.V.G.ARUN
R5 BY ADV. SRI.N.NANDAKUMARA MENON
SRI.K.VINODKUMAR
SRI.P.K.MANOJKUMAR

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 18/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.Koshy, A.K.Basheer & K.P.Balachandran, JJ.

W.A.No. 33 of 2006

JUDGMENT

Koshy, J.

Interpretation of Rule 37(1) of Chapter XIVA KER is the main issue to be decided in this case. A Division Bench of this Court referred the matter to the Full Bench noticing divergent views expressed in **Valsamma Thomas v. Manager** (1999 (3) KLT 777) and a Division Bench judgment in W.A.No.2920/01 (**A.K.Safiya and another v. Director of Public Instruction and others**). Before going to the question of law, we may advert to the facts of the case, as interpretation of a Rule and application of the same in a given case will depend upon the facts of the case.

2. The fifth respondent was appointed as HSA (Social Studies) in a leave vacancy from 13.7.1989 to 26.9.1989. She was relieved from service from

the afternoon of 26.9.1989 and she was appointed in a regular vacancy with effect from the forenoon of 27.9.1989. The appellant/petitioner was appointed as HSA (Mathematics) in a regular vacancy on 20.7.1989. The educational authorities, the District Educational Officer, Director of Public Instructions and the Government, held that since the appointment of the fifth respondent as HSA was continuous from 13.7.1989, she is senior to the appellant/petitioner. This has assumed importance when the post of Headmistress became vacant in 2006, as the senior most HSA can claim promotion. The seniority of a teacher is to be determined under Rule 37(1) of Chapter XIVA KER. It reads as follows:

> "Seniority of a teacher in any grade in any unit shall be decided with reference to the length of continuous service in that grade in that unit provided he is duly qualified for the post."

The statutory authorities (DEO, DPI and Government) concurrently took the view that since the fifth respondent was appointed earlier in the cadre of HSA (Social Studies) though in a leave vacancy, she had continuous service as HSA, as she was re-appointed on the next day itself in a permanent vacancy and therefore, she is senior. The above view was upheld by the learned single Judge in the judgment impugned in this appeal.

3. It is the contention of the appellant/ petitioner that that view cannot be accepted because on the afternoon of 26.9.1989 service of the fifth respondent came to an end and she was appointed afresh on a regular vacancy on the forenoon of 27.9.1989 and therefore, there is deemed break in service, even though in between there was no gap of working days. It is also her contention that it is not the length of service in a cadre, but, who has more continuous service in that cadre is the question. It is also pointed out that in **Valsamma's case** (supra) this Court held

that the question of application of Rule 37(1) of Chapter XIVA KER would apply only when the seniority is determined between two regularly appointed teachers and not between a regular appointee and a teacher appointed on a temporary basis. In that case, the appellant was working as HSA (Mathematics) at St.Mary's C.G.H.S., Ernakulam and one Elia P.A. was working as HSA (Mathematics) at Little Flower Girls' High School, Narakkal. They sought for inter management mutual transfer. As per the Rules, the above mentioned teachers have to be treated as junior most in the new schools, in which they were to be inter departmentally transferred. A leave vacancy of HSA (Mathematics) arose in the Little Flower Girls' High School, Narakkal on 29.9.1993, since a teacher Rosy Sheela took leave for five years. In that vacancy the fourth respondent therein was appointed for the period from 20.9.1993 to 30.3.1994 as a Probationary teacher and her appointment was approved only up to 30.3.1994. Therefore, she had to be relieved from

service on the closing day of the academic year. While the fourth respondent was continuing so, the DEO, by order dated 24.10.1993, ordered inter management transfer of the appellant and Elia.P.A. and hence, the appellant was posted as a permanent teacher of that school. The fourth respondent submitted a representation before the Manager to shift her lien in the vacancy of Elia, who was a permanent teacher and transferred on mutual basis with the appellant and to provide the appellant in the leave vacancy of Rosy Sheela. Since no action was taken, a writ petition was filed. This Court directed to dispose of that writ petition. The departmental authorities concurrently rejected the appeal. But, a learned single Judge of this Court rejected to consider the claim on the ground that the appellant in the case was transferred to the school on inter management basis, he is junior in that unit and hence the fourth respondent, who was appointed from 20.9.1993 till 31.3.1994 is senior and she shall be appointed in the permanent vacancy

of Elia, who was transferred to another school on mutual basis along with the appellant and the appellant can be appointed only to a leave vacancy. In that case, it was found that the appellant was a regular teacher before the vacancy arose. Though she came by inter management basis with a regular teacher, she became junior in that unit. The Rule that an incumbent, who is transferred to a school will be treated as junior in the new unit is only to protect the regular teachers working in the unit. The fourth respondent was not appointed on that day as a regular teacher. In view of her temporary appointment, she is entitled to be appointed to the regular vacancy, as a 51A claimant. That will not result in termination of the service of a teacher, who came to the school on mutual transfer basis. So, in effect, what was decided in the above decision is that a permanent teacher, who was transferred on inter management basis, though treated as junior, was the permanent teacher and a teacher appointed in a leave vacancy

cannot claim appointment in that vacancy under Section 51A of Chapter XIVA KER. If Elia was not transferred on mutual basis, the vacancy would not have occurred. 51A claimant will not have seniority over the same. In that context, it was stated that Rule 37 of Chapter XIVA KER would apply only when the seniority is determined between two regularly appointed teachers and not between a regular appointee and a teacher appointed on a temporary basis.

4. In W.A.No.2920/01, **A.K.Safiya v. Director of Public Instructions**, the question was that who was to be retrenched first. For that purpose Rule 37(1) of Chapter XIVA KER was considered. The Division Bench observed as follows:

> "In the light of Rule 37, the appellants are seniors in the post of HSA. In every other service, the seniority is normally counted from the date of regular appointment. But, in the case of Aided Schools, the nature of appointment or the

> nature of vacancy is irrelevant, but only length of continuous service is computed for determining seniority. The special provision has been enacted by the rule making authority in its wisdom to take care of the special situation in the Aided Schools."

Therefore, it was contended by the fifth respondent that irrespective of the nature of first appointment, for fixing the seniority length of continuous service has to be taken into account. On the facts of the case, we are of the opinion that apparently there is no conflict between the two decisions. But, the decisions were on the facts of those two cases and on application of the Rule on a given case.

5. The only question is whether service of the fifth respondent is continuous from 13.7.1989 or there is a break in service as after initial period of appointment was over in the after noon of 26.9.1989 and she was re-appointed in the fore noon of next day, ie. 27.9.1989. In support of the

above, the fifth respondent referred to Exhibit R5 (a) order dated 10.2.1990, wherein it is stated that her services were approved with effect from 13.7.1989 onwards. Exhibit R5(b) order dated 16.6.1990 also shows that her salary was also fixed and she was approved as a regular teacher from 13.7.1989 onwards. For all purposes, she was treated as a regular teacher from 13.7.1989 onwards, even though appointment to the leave vacancy was over from the afternoon of 26.9.1989 and on the next day onwards she started functioning as a regular teacher, as there was vacancy to accommodate her. Therefore, as an HSA her service was continuous. There is no dispute that for all the purposes like pension, fixation of increment, etc. the above continuous service will be counted. In the above view of the matter, we agree with the learned single Judge that the fifth respondent was appointed on 13.7.1989 and she had continuous service from that day, whereas the appellant/ petitioner was appointed only on 20.7.1989. Here,

the fifth respondent was senior on the principles laid down in Rule 37(1) of Chapter XIVA KER. In this connection, we also refer to a Constitutional Bench decision in **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra** ((1990) 2 SCC 715). In that case, observed as follows:

> "We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service."

A similar view was expressed by the Apex Court in **G.P.Doval v. Chief Secretary, Govt. of U.P.** ((1984) 4 SCC 329), wherein it was held that seniority has to be determined on the principle of length of continuous officiation reckoned from the date of first appointment.

6. 'Continuous service' means a service without any break, gap or jumps. The word 'continuous' is defined in **Words and Phrases**, Permanent Edition, published by West Publishing Company, as follows:

> "'Continuous' is defined as without break, cessation or interruption. Hode v. Sanford, C.C.C.A. Ga., 101 F. 2d 290, 292.
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> "Continuous' means connected, extended or prolonged without separation or interruption of sequence; unbroken; uninterrupted; unintermittent. Talbot v. Acheson, D.C.D.C., 110 F. Supp. 182, 183." (Page 327).

Again, at page 331, it is stated as follows:

> "**Uninterrupted**
>
> The word 'continuous' means connected extended or prolonged without cessation or interruption of sequence; Sullivan v. John Hancock Mut. Life Ins. Co. of

Boston, Mo. App., 110 S.W. 2d. 870, 877."

> "Word 'continuous' means without break, cessation or interruption, interrupted or unbroken and 'continuous service' is that which is practically uninterrupted. Kennedy v. Westinghouse Elec. Corp., 101 A.2d 592, 596, 29 N.J. Super, 68." (page 332)

Therefore, it can be seen that if the service is without interruption and practically uninterrupted, the service should be deemed to be continuous service. In this case, even though the fifth respondent was appointed from the fore noon of 13.7.1989 to the after noon of 26.9.1989, she was again appointed with effect from 27.9.1989 and continued her duties on 27.9.1989 without missing a single working day. Therefore, it is practically uninterrupted service and unbroken service. Break in service is an interruption in the service carrier of an employee. Her service was approved with effect from 13.7.1989 and she can continue

till the age of superannuation. Here, there is no gap or jumps. The fifth respondent was working continuous from 13.7.1989 onwards. We are of the opinion that as per the Rules, the fifth respondent is senior, as held by the three statutory authorities and the learned single Judge concurrently. Therefore, no interference is required in this appeal.

The appeal is dismissed.

(J.B.Koshy, Judge)

18th July, 2007 (A.K.Basheer, Judge)

(K.P.Balachandran, Judge)

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